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CASE No. 85-905

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

****

DONALD E. SALISBURY, PETITIONER

vs.

JAMES RIVER CORPORATION, AND
UNITED PAPERWORKERS INTERNATIONAL UNION,
AFL-CIO, AND LOCAL 1010
UNITED PAPERWORKERS INTERNATIONAL UNION,
RESPONDENTS

****

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

****

BRIEF OF RESPONDENTS UNITED PAPERWORKERS INTERNATIONAL UNION AND ITS LOCAL No. 1010 IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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STATUTES INVOLVED

Section 10(b) of the National Labor Relations Act, 29 U.S.C. § 160(b), provides in relevant part:

> Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint: Provided, that no complaint shall issue based upon any unfair labor practice occurring more than six (6) months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made....

Section 301(a) of the Labor-Management Relations Act, 29 U.S.C. § 185(a), provides:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

SUMMARY OF ARGUMENT

The Petition for Writ of Certiorari of Petitioner Donald E. Salisbury (hereinafter "Salisbury") should be denied because the facts of this case do not present an issue as to whether this Court's decision in DelCostello v. International Brotherhood of Teamsters, 462 U.S. 1512 (1983), should be applied retroactively. Salisbury's action is barred in any event by prospective application of Badon v. General Motors Corp., 679 F.2d 93 (6th Cir. 1982).

The Petition should also be denied because no genuine split in the decisions of the U.S. Courts of Appeals is present under the facts of this case, and because Salisbury cannot show under Chevron Oil Company v. Huson, 404 U.S. 97 (1971), that DelCostello should not be given retroactive effect.

ARGUMENT

The only question presented by Salisbury's Petition for Writ of Certiorari is whether the statute of limitations of § 10(b) of the National Labor Relations Act, 29 U.S.C. § 160(b), applies retroactively to bar Salisbury's action for breach of contract under § 301(a) of the Labor Management Relations Act, 29 U.S.C. § 185(a). Rule 21.1(a), Rules of the Supreme Court of the United States. Since Salisbury's action is barred in any event by prospective application of the Sixth Circuit Court of Appeal's decision in Badon v. General Motors Corp., 679 F.2d 93 (1982), the facts of the instant case do not present an appropriate opportunity to consider the question of whether this Court's decision in DelCostello should be

applied retroactively.[1]

On May 25, 1982, the Sixth Circuit Court of Appeals decided in Badon that so-called "hybrid" § 301 breach of contract and unfair representation actions arising in Michigan must be brought within the six-month statute of limitations of § 10(b) of the National Labor Relations Act. This resulted from the circumstance that the state of Michigan had not adopted an arbitration statute which would apply to collective bargaining agreements. Since

[1]Respondents United Paperworkers International Union and its Local No. 1010 note also that this Court has denied certiorari in cases presenting this question on at least four occasions. Greyhound Lines, Inc. v. Wilhite, et al., ____ F.2d ____ (9th Cir. 1985), cert. denied, No. 84-2016 (slip op., Oct. 15, 1985); Saville v. Westinghouse Electric Corp., ____ F.2d ____ (3rd Cir. 1985), cert. denied, No. 84-2034 (slip op., Oct. 15, 1985); Welyczko v. U.S. Air, Inc.., 733 F.2d 239 (2nd Cir. 1984), cert. denied, 105 S.Ct. 512 (1984); Edwards v. Teamsters Local No. 36, 719 F.2d 1036 (9th Cir. 1983), cert. denied, 104 S.Ct. 1599 (1984)

Michigan did not have a statute which might be adopted under this Court's decision in United Parcel Service v. Mitchell, 451 U.S. 56 (1981), the Sixth Circuit in Badon turned to § 10(b) as the appropriate statute of limitations, relying primarily upon Justice Stewart's concurring opinion in Mitchell.

As the Court of Appeals and District Court below both noted, Salisbury was discharged in August, 1982, and his cause of action against the Unions and Respondent James River Corporation (hereinafter the "Company") accrued no later than October, 1982. Thus, Salisbury's cause accrued over four months after the Sixth Circuit held in Badon that the six-month statute of limitations applies to actions of this nature. Accordingly, the facts of this case simply do not raise the only issue asserted in the

Petition for Writ of Certiorari, and the petition therefore should be dismissed.[2]

For similar reasons, no split in the decisions of the Courts of Appeals which might require review by this Court is raised under the facts of this case. The First, Second, Third, Fourth, Fifth, Sixth, Seventh, Eighth, and Eleventh Circuit Courts of Appeals have all applied DelCostello retroactively. See Smith v. General Motors Corp., 747 F.2d 372, 374-75 (6th Cir. 1984), and cases cited therein.

Although the Ninth Circuit has held that DelCostello should not be applied

[2]Respondent Unions note that Salisbury has failed to offer any argument before either the District Court or Court of Appeals, or in this Petition, as to why his action is not barred by Badon, even though the District Court relied exclusively on Badon, and expressly noted that Salisbury's "claim accrued after the Badon decision, and was filed more than six months after its accrual...." (District Court Memorandum and Order, Jan. 12., 1984, p. 3.)

retroactively, Edwards v. Teamsters Local Union No. 36, 719 F.2d 1036 (9th Cir. 1983), cert. denied, 104 S.Ct. 1599 (1984), that Court has since explained that DelCostello should not be applied retroactively when it would serve to shorten the limitations period, but that it should be applied retroactively when it would lengthen the limitations period. Glover v. United Grocers, Inc., 746 F.2d 1380 (9th Cir. 1984). The Court explained that where retroactive application causes no inequity to the plaintiff, such as by extending the limitations period, DelCostello should be applied retroactively.

As noted supra, the case law in the Sixth Circuit at the time Salisbury's cause of action accrued applied the six-month statute of limitations of § 10(b). Accordingly, Salisbury could not reasonably have relied upon a longer limitations period,

and his cause would be barred even under the Ninth Circuit's reasoning in Edwards and Glover.

The Unions also agree with the Company's position, in its Brief in Response to Petition for Certiorari, that Salisbury cannot show that DelCostello should not be given retroactive effect under this Court's decision in Chevron Oil Co. v. Huson, 404 U.S. 97 (1971).

CONCLUSION

For the foregoing reasons, Respondent Unions respectfully request that the Petition for Writ of Certiorari be denied.

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CERTIFICATE OF SERVICE

I, LYNN AGEE, Attorney, hereby certify that three (3) copies of the foregoing Brief of Respondents United Paperworkers International Union and its Local No. 1010 in Opposition to Petition for Writ of Certiorari were served by first-class mail, postage prepaid, on all counsel of record at the following addresses on this 8th day of November, 1985:

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